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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JACK RABIN, Plaintiff and Appellant, v. MICHAEL A. LOTTA, Defendant and Respondent.	B211590 (Los Angeles County Super. Ct. No. BC368878)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Jack Rabin, in pro. per., for Plaintiff and Appellant.

Michael A. Lotta, in pro, per., for Defendant and Respondent.

Jack Rabin appeals from an adverse judgment in his action for malicious prosecution arising from a cross-complaint filed against him by the defendant Michael Lotta. He argues that his right to a jury determination of various issues was violated. We find no violation because the parties stipulated to a bench trial. Rabin also challenges the sufficiency of the evidence to support the judgment. Exercising our independent review of the facts determined by the trial court, we conclude Lotta had probable cause to bring his cross-complaint, and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Jack Rabin is a medical doctor who consults and testifies as an expert witness on medical malpractice and workers' compensation cases. Michael Lotta is an attorney who represents plaintiffs in medical malpractice and other types of cases. Rabin met Lotta at the Workers' Compensation Appeals Board in the first half of the 1990's. Lotta represented Rabin in collecting his liens from workers' compensation cases. Lotta acted as a legal consultant on a medical peer review case in which Rabin was involved. He also provided services for Rabin on some family matters, including issues about the estate of Rabin's late brother and a company formed by Rabin's daughter-in-law, Jennifer Rabin. Rabin consulted on medical malpractice cases for Lotta, reviewing them and sometimes testifying as an expert witness.

This relationship continued for years without being formalized. Neither Rabin nor Lotta sent the other statements of accounts or other formal tallies of work performed. Lotta took a portion of the liens he collected for Rabin as payment. He paid Rabin for his expert testimony from settlement proceeds or judgments on cases on which he prevailed.

According to Rabin, at some point, Lotta got quite a bit behind in paying him. Because he was 80 at the time, Rabin "wanted to make sure that . . . there would be some memorialization of those fees that he owed me. And we discussed it. [I]'d also had some stress because I had had a heart condition. And I was worried about my wife and making sure that—it was a substantial amount of money that was owed. So [Lotta] and I had a discussion in his office, and by mutual agreement, we came to the idea of a promissory

note." Rabin did not have much memory of the individual cases on which money was owed, testifying that he and Lotta "just agreed on a sum." Rabin felt it was more, but agreed to $20,000. He told Lotta that there would be no interest for a few months to give him time to pay on the note, so interest was not included in the note. Lotta wrote the note on his computer, signed it, and gave it to Rabin. According to Lotta, Rabin was his only remaining expert witness on a medical malpractice case set for trial in the near future. Rabin demanded the note, saying he would not testify if the note was not executed.

Rabin waited a number of months, then asked for payment, but Lotta was still under financial duress. Rabin's other requests for payment were unsuccessful and finally, a year after the note was executed, Rabin made a written request for payment. According to Rabin, Lotta always acknowledged that he owed money on the note. Rabin continued to work for Lotta before and after execution of the note.

When no payment was forthcoming, Rabin sued Lotta on the note in May 2005. (*Rabin v. Lotta* (Super. Ct. L.A. County, No. 05C01337).) Lotta cross-complained against Rabin, Rabin's son Mathew, and Mathew's wife, Jennifer Rabin. His first amended cross-complaint alleged causes of action for quantum meruit, breach of oral and implied contract, and fraud. The breach of contract and fraud causes of action were dismissed and only the quantum meruit claim was tried. On December 27, 2006, the unanimous jury found for Rabin on his complaint and against Lotta on the cross-complaint. On February 2, 2007, judgment was entered on the jury's verdict awarding Rabin $20,000, plus prejudgment interest, costs, and fees for a total amount of $38,971.01.

Rabin, his son Mathew, and daughter-in-law Jennifer, brought a malicious prosecution action against Lotta alleging he had no probable cause to pursue his cross-complaint against them. (*Rabin v. Lotta* (Super. Ct. L.A. County, 2007, No. BC368878).) After the parties agreed to waive jury, a bench trial was held. The trial court found Lotta had probable cause to file the cross-complaint in the underlying action. The looseness and lack of documentation of the longstanding arrangement between Lotta and Rabin, together with the absence of bills or invoices on either side, led to the court's finding that

it could not conclude the cross-complaint against Rabin was wholly without merit. It reached the same conclusion as to the cross-complaint against Mathew and Jennifer Rabin.

Judgment in favor of Lotta was entered. Rabin filed a timely appeal. Mathew and Jennifer Rabin are not parties to this appeal.

DISCUSSION

I

Rabin claims he was deprived of his right to jury trial. The record establishes that Rabin demanded a jury trial and deposited the appropriate fees. On the first day of trial, the court noted the parties had agreed to a bench trial rather than jury trial. Rabin, who was represented by counsel but was present, voiced no objection then or at any time during the trial. At the conclusion of the trial, Rabin sought and received a return of his deposit of jury fees. We find no deprivation of the right to jury trial on this record.

II

Rabin challenges the sufficiency of the evidence to support the trial court's finding that Lotta had probable cause to support his cross-complaint for quantum meruit. "To prevail on a claim for malicious prosecution, the plaintiff must show the prior action was begun with malice and without probable cause at the defendant's direction and was terminated in the plaintiff's favor. The probable cause element is objective, not subjective, with the trial court required to determine whether, on the basis of the facts known to the defendant, it was legally tenable to bring the prior action. The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 [*Sheldon Appel*].)" (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1544.)

Different standards of review apply to the probable cause and malice elements of the tort. We begin with the question of probable cause. Where the resolution of the probable cause issue turns on disputed facts, the trier of fact (a jury if there is one; if not,

the trial court) must resolve the threshold question of the defendant's knowledge at the time he or she sued. (*Sheldon Appel, supra*, 47 Cal.3d at p. 881; *Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 913.) After that finding of fact is made, the trial court determines whether the facts constituted probable cause to institute the underlying action. (*Sheldon Appel,* at p. 881.) As we have discussed, since a jury trial was waived here, the resolution of the factual dispute was for the trial court. Our review of the legal issue is de novo. (*Arcaro v. Silva and Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156.)

"[P]robable cause is determined objectively, i.e., without reference to whether the attorney bringing the prior action believed the case was tenable ([*Sheldon Appel*, *supra*, 47 Cal.3d] at pp. 877-882), and . . . the standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal [citation], i.e., probable cause exists if 'any reasonable attorney would have thought the claim tenable.' (*Sheldon Appel*, *supra*, at p. 886.) This rather lenient standard for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.' (*Id.* at p. 885.) Attorneys and litigants, we observed, '"have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ."' (*Ibid.*, quoting *In re Marriage of Flaherty* [(1982) 31 Cal.3d 637,] 650.) Only those actions that '"any reasonable attorney would agree [are] totally and completely without merit"' may form the basis for a malicious prosecution suit. (*Ibid.*)" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.)

Appellant challenges the trial court's finding that Lotta had probable cause to bring his action for quantum meruit. Lotta's claim was based on work done for Rabin on several matters. The first of these involved a peer review of hospital privileges for Dr. G. Frank Pourzia which lasted for years. Rabin represented Pourzia in that proceeding without charge. (Attorneys were not allowed to participate in such hearings.) Lotta consulted on the matter with the goal that if the outcome of the peer review was adverse to Pourzia, he would be retained by Pourzia for a future civil action against the hospital and others. According to Lotta, Rabin was supposed to trade services to Lotta on a quid

pro quo basis in exchange for the time Lotta spent on the Pourzia matter. Rabin testified that Lotta provided the services to Pourzia for free, in anticipation of the future representation. He said he never agreed to pay Lotta for his services on this matter. Lotta testified that he never expected to be paid by Pourzia but believed he would be compensated by Rabin through their quid pro quo arrangement.

Rabin and Lotta disputed the nature of the legal services provided to Pourzia during the lengthy peer review process. According to Lotta, his services were much more extensive than Rabin described in his testimony.

Rabin cites evidence to support his version of their agreement, but does so without citation to the record on appeal. He mentions Lotta's testimony in another matter, which was admitted in this trial, that Lotta was assisting Rabin on the Pourzia review at no charge in anticipation of being hired by Pourzia for future civil litigation. He also cites Lotta's testimony that the services he rendered on the Pourzia matter were not for or on behalf of Rabin. Rabin concludes: "The claim that Dr. Rabin owed LOTTA any money for work done for a third party . . . is pure fantasy, not based in any fact produced by LOTTA."

Lotta also claimed $21,000 in quantum meruit recovery for legal services provided in an action brought by Rabin against the executor or administrator of the estate of Rabin's late brother. Rabin claimed estate assets had been improperly distributed. Like the parties, we refer to this as the *Rabin v. Harrington* matter. Rabin claims that Lotta agreed to waive his fees for this work and accept his costs as payment. He claims Lotta executed a written waiver of these fees in August 2004. The exhibit to which Rabin refers is a settlement breakdown on Lotta's office letterhead, reflecting a settlement breakdown of *Jack Rabin v. Linda Harrington*, which notes that attorney fees were waived.

Rabin also challenges Lotta's claim for $4,950 for services as typist for Rabin. Rabin argues that Lotta never claimed payment until the cross-complaint was filed, and he denies owing that amount. In addition, Rabin argues no one, including himself, would pay $350 per hour for an attorney to type for him. This is the same fee Lotta charged for

his professional services as an attorney. Finally, Rabin argues that it was agreed that these services were to be free.

In a bill of particulars filed in the underlying action, Lotta claimed that Rabin owed him for 17.5 hours of legal services for typing letters over the years, as far back as 1999. Rabin asserts these claims would have been time-barred in a quantum meruit suit. Rabin cites Lotta's testimony in the trial of a separate matter that an attorney is not supposed to bill a client for secretarial work. He also refers to page "21" but does not explain the reference.

Lotta claimed $3,500 in his cross-complaint from Mathew and Jennifer Rabin for services rendered in an attempt to resolve a management dispute over the operation of Virgo Media, a company formed by Jennifer Rabin and a partner. Rabin argues Lotta knew he provided these services for free, never demanded payment until the cross-complaint, and presented no evidence at the underlying trial in support of the claim. We question Rabin's standing to assert this issue since it involved only Mathew and Jennifer who are not parties to this appeal.

To support his argument that all of Lotta's claims were without merit and lacked probable cause, Rabin mentions a ruling by Judge William Highberger that he had a probability of success on his claims. This is an apparent reference to a ruling by Judge Highberger denying Lotta's special motion to strike the malicious prosecution action under Code of Civil Procedure section 425.16 (anti-SLAPP). This ruling does not resolve the question whether the evidence at trial established that Lotta had probable cause to bring his cross-complaint.

The testimony and exhibits at trial established that Rabin and Lotta failed to formalize their agreement to exchange medical consultation and expert testimony for legal work. Neither party maintained complete records of the work performed for the other. Neither demanded payment from the other until Rabin asked for the $20,000 note. There was evidence that Rabin received $44,750 from Lotta in payment for his work on some cases. There also was evidence that Lotta received a percentage of the money he collected on liens for Rabin's work on various workers' compensation matters. Rabin

testified that he had paid Lotta for all professional work with the possible exception of the estate of his brother. There was also ample evidence that both parties provided extensive professional services to the other for which no payment had been received at the time of trial.

Lotta was shown a computer report generated by his sister listing checks paid to Rabin for services on 12 cases. According to Lotta, this list represented "way less" than 10 percent of the cases Lotta had with Rabin over the years. He paid Rabin when he asked for payment, or when a case settled he paid what Rabin said was due. For the remaining 90 percent of their cases, it was a quid pro quo arrangement.

Lotta testified that the men had a quid pro quo or barter agreement to exchange services, and that services that exceeded those provided by the other would be compensated. Rabin disputed this, arguing that the services were provided pro bono with the exception of payments from the collection of liens, settlements or judgments. According to Rabin, the arrangement with Lotta was not loose; they would straighten accounts periodically.

The reason for the $20,000 note also was disputed. Rabin testified that Lotta was behind in payments to him, that Rabin was in his 80's, and felt the need to memorialize what Lotta owed him for his services. According to Rabin, he took a summary of the cases on which he worked to Lotta and the two men discussed what was owed. When Lotta suggested he would pay $20,000 to settle the account, Rabin agreed. Lotta disputed this testimony and said that he executed the note only because Rabin threatened to withhold his services as an expert witness on a case which was scheduled to go to trial shortly.

As the trial court observed, the jury's findings in the underlying action that Rabin was entitled to recover on the note and that Lotta was not entitled to quantum meruit compensation does not resolve the issue of whether Lotta had probable cause to file his cross-complaint. Lotta's belief that the cross-complaint was compulsory did not resolve the issue of whether he had probable cause to file that pleading. The trial court found: "Based on the testimony of Dr. Rabin and Mr. Lotta, I think it shows that at least some

limited type of quid pro quo arrangement existed. . . . Dr. Rabin provided expert and consultation services to Mr. Lotta, principally in regard to medical malpractice cases, on up to 100 cases. He was in Mr. Lotta's office as many as two to three times a week."

The court found no dispute that Rabin and Lotta exchanged professional services. After a review of the testimony, it found: "Both Dr. Rabin and Mr. Lotta testified, in part, that they, to some extent, exchanged services . . . ." While the settlement breakdown on the *Rabin v. Harrington* matter indicated attorney fees had been waived, the trial court found that this was not inconsistent with Lotta's testimony that he waived the fees "because Dr. Rabin had done some things for him for which he had not charged . . . ." Regarding the Pourzia matter, the trial court found that Lotta had an interest in assisting Rabin to eventually be able to represent Pourzia in future litigation. It found: "[I]t appears that once there was a demand on the note, that Mr. Lotta went back to calculate fees for what he believed was the reasonable value of his assistance to Dr. Rabin." The court cited Lotta's testimony in an unrelated case, which was admitted here, that his work on the Pourzia matter was pro bono, but concluded that this testimony did not resolve the issue: "That testimony could be consistent with Lotta's position that he never intended to charge Dr. Pourzia for the services but still considered it to be part of his quid pro quo arrangement with Dr. Rabin."

The court concluded: "[B]ecause of the fact that the longstanding financial relationship and payment arrangements between Dr. Rabin and Mr. Lotta were so loose and undocumented and so uncertain over the number of years that Dr. Rabin and Mr. Lotta worked together, the fact that there's no bills or invoices for services provided by either side, at least having been produced to the court, based on all of the evidence presented, I cannot conclude that the cross-complaint against Dr. Rabin was wholly without merit."

We find substantial evidence to support the trial court's finding that there was an agreement between Rabin and Lotta to exchange professional services and to compensate each other for at least some of those services. Both Rabin and Lotta testified that they had received payments for some, but not all of the services they rendered. Probable

cause exists if "any reasonable attorney would have thought the claim tenable . . . ." (*Sheldon Appel, supra*, 47 Cal.3d at p. 886.) Here, Lotta had provided extensive legal services to Rabin in connection with the Pourzia peer review and the estate of Rabin's brother, for which he had not received compensation. A reasonable attorney would have thought Lotta's claim against Rabin for compensation based on quantum meruit to be tenable. In light of our conclusion that Lotta had probable cause to bring his quantum meruit cross-complaint, he is entitled to judgment and we need not discuss the evidence of malice. (*Id*. at p. 878.)

III

Rabin raises several other issues which do not change our conclusion. He argues that Lotta's claim for payment on the Pourzia matter was time-barred because that matter concluded in November 2002, two and one-half years before Lotta filed his cross-complaint in June 2005. The record before us is inadequate to determine whether the statute of limitations issue was litigated in the underlying action on Lotta's cross-complaint. Here, in closing argument, counsel for Rabin addressed the statute of limitations, asserting that a quantum meruit claim is limited to services provided in the two years preceding the filing of the cross-complaint. Lotta's attorney did not address the point in his argument.

Even if some of Lotta's claims were time-barred, there was evidence, as the trial court found, that the parties had a loose arrangement to exchange services, without regard to legal niceties such as the statute of limitations. The evidence established probable cause to bring the cross-complaint.

Rabin repeatedly invokes evidence that Lotta was subject to discipline by the State Bar of California during the relevant time period, and asks us to take judicial notice of the Bar records. We decline to do so as the records have no apparent relevance to the issue of probable cause.

In addition, Rabin complains that the case was reassigned to another judge for trial by the superior court without explanation. He fails to cite any authority for the proposition that his consent to an administrative reassignment of cases was required.

California Rules of Court, rule 3.734 authorizes the presiding judge to order the assignment of any case for all purposes to a judge on the court's own motion. We find no basis for reversal on this ground.

Finally, Rabin argues that the trial court failed to make individual findings of fact and law. There is no indication in the record that Rabin or his counsel requested a statement of decision. "A failure to request a statement of decision results in a waiver of findings and conclusions necessary to support the judgment . . . ." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269.)

DISPOSITION

The judgment is affirmed. Each side to bear its own costs on appeal.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.